APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 460—September Term, 1963.

(Argued May 12, 1964 Decided May 28, 1964.)

Docket No. 28796

UNITED STATES OF AMERICA,
Appellee,

v.

SAMUEL G. BENO,
Defendant-Appellant.

Before:

KAUFMAN and HAYS, *Circuit Judges,*
and BARTELS, *District Judge.**

Appeal from a judgment of conviction for soliciting and receiving a gratuity, with the intent that it influence an official decision, 18 U.S.C. § 202, after a trial by jury before Timbers, *J.*, in the United States District Court for the District of Connecticut.

Affirmed.

ROBERT C. ZAMPANO, United States Attorney, District of Connecticut, New Haven, Connecticut, *for appellee.*

---

* Sitting by designation.

W. PAUL FLYNN, of Kopkind & Flynn, New Haven, Connecticut (Frank J. Raccio, on the brief), *for defendant-appellant.*

KAUFMAN, *Circuit Judge:*

After we reversed and remanded his initial conviction for accepting a gratuity with the intention that it influence his official conduct, because incompetent and prejudicial evidence was admitted at his first trial, 324 F.2d 582 (2d Cir. 1963), Internal Revenue Agent Samuel G. Beno was again tried and convicted for the same offense. Asserting that his "involuntary admissions" were improperly admitted on his second trial, Beno again appeals.

Virtually all of the relevant facts were fully set forth in our opinion on Beno's first appeal and it is unnecessary to restate them here in any detail. For present purposes, it is sufficient to note that the chain of events leading to Beno's arrest commenced when the defendant noticed the name of Charles Guinta, listed on the income tax return of the Walden Book Company of Stamford, Connecticut, as treasurer of the company. Since he had previously known an accountant by the name of Richard Guinta, Beno telephoned Richard, informed him that Walden's return was before him for an audit, and asked whether Richard and Charles were related. When he was told that the two were brothers, Beno informed Richard that he was interested in obtaining a set of the Encyclopaedia Britannica and a "good dictionary," to which Richard replied that the message would be forwarded to Charles. Subsequently, before Richard was able to tell Charles of Beno's call, the defendant again phoned Richard, and, in Richard's words

at the trial, "mentioned . . . [that] . . . he was interested in an arrangement whereby the books could be mailed to him, and . . . that he would survey the return and mark it 'No tax potential.'"

Immediately upon being informed by Richard of his conversations with Beno, Charles notified the inspection division of the Internal Revenue Service in Boston. And, as revealed through Charles' testimony at trial, the Service requested his cooperation "in finding out whether or not this man [Beno] was merely wishing to purchase a set of encyclopaedia and dictionary, or perhaps solicit a gift." Accordingly, Charles telephoned Beno, and, after Beno told him that he had been assigned Walden's return and "that there would be no problem in it . . . he would survey it," a meeting was arranged between Beno and Charles in the latter's office on October 2, 1961. Without Beno's knowledge, it was planned that a Fargo tape recorder would be hidden in the office, and that a Minifon recorder would be secreted on Charles' person so that the ensuing conversation might be recorded.[1] In addition, as it turned out, Internal Revenue agents were stationed in a room adjoining Charles' office, and, by means of a headset connected to the tape recording apparatus, were enabled to overhear the October 2nd conversation as it was in progress.

At the trial, Charles testified that the agents provided him with general instructions concerning the course of his conversation with Beno. Thus, in light of Beno's earlier remarks to both

[1] The tape recorder was designed to record any conversation which took place in Charles' office; the Minifon was also able to pick up any additional statements made after Charles and Beno left the office. So as to eliminate duplication at trial, only the Fargo tape was played with respect to the office conversation, and only those portions of the Minifon recording which related to the discussion after Charles and Beno left the office were played for the jury.

Guintas, Charles was instructed to discover "what a survey was all about," as well as to "ask Mr. Beno about my own personal return, to give Mr. Beno every opportunity to pay for the books, be sure to tell him what the price of the books were, be sure to tell him that this was a no-discount [redacted] and to give him every opportunity to pay for the books." As recounted by Charles at trial, the agents "repeated several times that they were interested in getting the facts and to determine whether or not there was any wrong-doing here."

The October 2nd conversation took place as planned. Although, as we indicated in our earlier opinion, Beno did not provide the prosecution with "plainly incriminating admissions," 324 F.2d at 583, he never offered to pay for the books, and the jury properly could have found from all the evidence and circumstances that Beno was subtly promising to relieve Walden of any potential tax difficulties if Charles were generous enough to supply the books without charge, or in short, that he solicited a bribe. In any event, Charles gave Beno the encyclopaedia and the dictionary, and, after they were placed in Beno's car, the defendant was arrested by the Revenue agents.

At the trial, Charles testified as to his October 2nd conversation with Beno, and the tape and Minifon recording of that conversation were placed into evidence and played for the jury. On appeal, in a claim vaguely based on the Fourth and Fifth Amendments, Beno appears to contend that the conversation with Charles, prearranged and recorded by government agents, was in some respect illegal, and that Guinta's recounting of Beno's end of the conversation thus represented and improper attempt to introduce "involuntary admissions" of the defendant. The same claim seems to be made with respect to the introduction of Exhibits H and I, the recordings of the con-

versation, and to the playing back of portions of these to the jury.

At the outset, it would be helpful to clarify several aspects of the defendant's arguments on appeal. First, Beno has at no time — either here or below — raised any question of a possible claim of entrapment, and, in fact, the defense was explicitly disclaimed at trial. There is, therefore, no contention that Beno was "lured" into committing an offense — either by the government agents, or by Charles Guinta, acting on their behalf. Compare *Sherman* v. *United States*, 356 U.S. 369 (1958). Secondly, as the statements of the government agents make plain, the October 2nd conversation transpired when the charges against Beno were at most in the investigatory stage; the agents were simply "interested in getting the facts and to determine whether or not there was any wrong-doing." Accordingly, decisions which deal with post-indictment questioning of a defendant are wholly inapposite. See *Massiah* v. *United States*, —— U.S. —— (32 U.S.L. Week 4389, May 19, 1964); *People* v. *Waterman*, 9 N.Y. 2d 561, 216 N.Y.S. 2d 70 (1961).

With these considerations in mind, it is clear that Beno's amorphous contentions are wholly without merit. In the first place, it seems plain that anything which Beno may have said

---

There is some question on appeal as to whether Beno made a timely objection at trial to the introduction and playbacks of the tape and Minifon recording. While the issue is not clear, and although it might be argued that any objections, even if made, were waived, we will assume for present purposes that all objections were raised in the proper fashion and adhered to.

Indeed, the Supreme Court in *Massiah* was careful to note that "it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted." In the present case, where Beno had not even been arrested at the time of the conversation in question, his argument is all the weaker.

during the course of the October 2nd conversation is not to be considered as an "admission," made *after* the commission of the offense. The words constituted, instead, *the commission of the crime itself*. See *Todisco* v. *United States*, 298 F.2d 208, 212 (9th Cir 1961), *cert. denied*, 368 U.S. 989 (1962). If Beno was found to have been subtly soliciting a bribe, he was *at that moment* violating the law; absent a claim of entrapment, we can perceive of no reason why Guinta might not testify as to the defendant's attempts to solicit the bribe. In short, Beno's efforts to strike Guinta's testimony as embracing "involuntary admissions" seem almost frivolous; bribery statutes would have little meaning if a victim were not permitted to testify that he had been asked for a bribe. It being true that Guinta might clearly testify as to the dialogue between Beno and himself during the bribe solicitation incident, there would seem no reason why the recorded versions of this dialogue — as embodying a far more accurate reconstruction than Guinta's recollections — could not also be introduced, and played for the jury. As the Supreme Court observed in relation to the playback of a tape which contained an incriminating conversation between the defendant and a government agent, "the [recording] device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." *Lopez* v. *United States*, 373 U.S. 427, 439 (1963).

Secondly, constitutional claims, similar to and stronger than those invoked by Beno, have been repeatedly rejected in a long line of cases. See, *e.g.*, *On Lee* v. *United States*, 343 U.S. 747 (1952); *Lopez* v. *United States*, 373 U.S. 427 (1963); *United States* v. *Kabot*, 295 F.2d 848 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962). In *On Lee*, the defendant's friend was "wired for sound" and entered On Lee's laundry to conduct a conversation with him *while the defendant was at large on bail and awaiting trial*. Affirming On Lee's conviction, the Supreme

Court held that a government agent who had been standing outside the laundry was properly permitted to testify as to the defendant's admissions, which the agent had heard through a receiver connected to the transmitter carried by the cooperating friend. More recently, in *Lopez*, the Supreme Court cited *On Lee* in approving the receipt into evidence of a tape recording, made when a *government agent* secreted a recorder on his person during a conversation with the defendant *in the defendant's office*. And finally, in a bribery case virtually identical to this one, a recorded conversation pre-arranged by government agents was held properly admitted by this court in *Kabot*.

Here, the government agents were engaged in an honest attempt to discover the nature of Beno's conduct; the conversation took place in Charles Guinta's office with his consent; Charles was not a government agent but a private citizen; and, the case was still in the investigatory and pre-arrest stage. It follows, therefore, that Beno's contentions are considerably weaker than those rejected in *On Lee* and *Lopez* and are certainly no stronger than those which we found unpersuasive in *Kabot*. The recordings were hence properly received in evidence. Since Beno's other contentions are without merit, the conviction is affirmed.

APPENDIX B

Title 18 United States Code, Section 202.

62 Stat. 691, 80th Cong. 2nd Sess. Chapter 641, June 25, 1948.

Section 202: Acceptance Or Solicitation By Officer Or Other Person

"Whoever, being an officer or employee of, or person acting for on on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, . . . asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust or profit under the United States."

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 328

SAMUEL G. BENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 333 F. 2d 669. A prior opinion of the court of appeals is reported at 324 F. 2d 582.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1964. On June 29, 1964, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including July 27, 1964 and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conversation while unlawfully soliciting a gratuity was properly proved by the testimony of his victim, corroborated by wire and tape recordings.

STATEMENT

After a trial by jury in the United States District Court for the District of Connecticut, petitioner was convicted on an indictment charging that he solicited and accepted a gratuity from a corporate taxpayer with intent that it influence his official action as an employee of the Internal Revenue Service in violation of 18 U.S.C. 202.[1] He was sentenced to imprisonment for one year and one day (R. 149a). The court of appeals affirmed.

1. At trial the government presented, *inter alia*, the testimony of the corporation's treasurer, one Charles Guinta, from whom petitioner solicited the gratuity on October 2, 1961. Tape and wire recordings of the conversation had between petitioner and Guinta in the latter's office on that date were played for the jury.

On September 26, 1961, petitioner, when examining the return of the Walden Book Com-

[1] A first trial upon the same charges also resulted in a conviction which was reversed, and the case remanded for a new trial, because of the admission of incompetent evidence. See *United States* v. *Beno*, 324 F. 2d 582 (C.A. 2).

pany (of Stamford, Connecticut), noticed that the name of Charles Guinta was listed thereon as company treasurer. Since he knew an accountant by the name of Richard Guinta, petitioner called Richard to ask if he were related to Charles. Upon being told that the two Guintas were brothers, petitioner told Richard that he was interested in obtaining a set of Encyclopedia Britannica and a "good dictionary." Richard replied that he would call his brother Charles (R. 13a). Two days later petitioner again called Richard Guinta, said he was interested in an arrangement whereby the books could be mailed to him, and added that he would "survey" the Walden Book Company return, i.e., return it to the internal revenue home office without examining the company's books (R. 59a) and mark it "no tax potential" (R. 14a).

When Charles Guinta was told by his brother about the conversation with petitioner, he notified the inspection division of the Internal Revenue Service. The Service asked for Guinta's assistance "in finding out whether or not this man was merely wishing to purchase a set of encyclopedia and dictionary, or perhaps solicit a gift." (R. 89a).

On September 29, Charles Guinta attempted to telephone petitioner. When petitioner returned the call, Guinta told him that the company had the encyclopedias and asked for more information. Petitioner explained that there would be no problem as to the company's return, that he would "survey" it and send it back to the home office. Guinta suggested that petitioner come to his office to talk it over, and petitioner answered that he would call him later. Petitioner

later arranged a meeting for Monday, October 2 (R. 50a-53a).

On October 2, Internal Revenue investigators, with Guinta's permission, installed a Fargo tape recorder in Guinta's office and secreted a minifon wire recorder on Guinta's person (R. 55a). The investigators removed themselves to an adjoining room where, by means of a headset connected to the tape recording apparatus, they were able to hear any conversation taking place in the office (R. 123a). They instructed Guinta "to give Mr. Beno every opportunity to pay for the books, be sure to tell him what the price of the books were, be sure to tell him that this was a no-discount item, and to give him every opportunity to pay for the books" (R. 89a-90a). The investigators "repeated several times that they were interested in getting the facts and to determine whether or not there was any wrong-doing here" (R. 90a).

When petitioner arrived in Guinta's office, the conversation between the two men was recorded. Petitioner expressed his interest in the books and explained how he would "survey" a tax return "if you have a friend" (R. 59a). He said that he had surveyed the corporation's return, and that he would look for the related return of Walden's subsidiary company, assign it to himself and survey that (R. 60a). Each time that Guinta brought up the subject of the price of the books ($400) or the no-discount character of the books, petitioner changed the subject (R. 94a). The two men went to the stockroom to pick up the books. Petitioner thanked Guinta, shook hands, told him to let him know if he ever had prob-

lems, and left without referring to payment for the books (R. 62a, 95a).

2. When Charles Guinta was asked about his conversation with petitioner, petitioner objected that such testimony was inadmissible because "the statements were not voluntarily made, that they were in fact induced * * * and that the defendant has the right to assert this privilege [against self-incrimination] at this time" (R. 44a). Counsel specifically disclaimed that petitioner was thereby making a claim of entrapment (R. 44a-45a). The objection was overruled (R. 49a). Thereafter the recording equipment and the recordings were introduced into evidence (R. 111a, 118a, 120a, 123a) with petitioner renewing only his original objection and that only with respect to the minifon recording (R. 122a).

Petitioner's defense was that he did not expect to receive a gratuity but intended to pay for the books (R. 146a-147a).

ARGUMENT

Petitioner's contention that the evidence of his conversation with Charles Guinta was inadmissible as having been obtained in violation of his constitutional rights is without merit.[1] At the time of his conversa-

[1] Specifically petitioner argues that his rights against unreasonable search and seizure, and self-incrimination, were violated and that he was deprived at the time of the right to assistance of counsel. Petitioner made no motion to suppress prior to or during trial. His objection at trial to the evidence now challenged vaguely expressed an assertion of a privilege against self-incrimination and was not consistently adhered to with respect to all the evidence of the conversation.

tion with Guinta, he was not making an admission subject to interrogation after the commission of the crime, but was in fact engaged in the actual commission of the crime. See *Todisco* v. *United States*, 298 F. 2d 208, 212 (C.A. 9), certiorari denied, 368 U.S. 989. Obviously, the government was not required to furnish him with a lawyer at the time he chose to commit a crime.

The unlawful solicitation, like the offer of a bribe, is not a constitutionally protected communication. *Lopez* v. *United States*, 373 U.S. 427, 438. This being so, the solicitor takes the risk that his solicitation will be accurately reproduced in court "whether by faultless memory or mechanical recording." *Lopez*, *supra*, 373 U.S. at 439. As in *Lopez*, the recording furnished corroborative evidence of the witness' tetimony at trial. Moreover, here, unlike *Lopez*, there was not even a physical intrusion upon premises to which petitioner had any right.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

SEPTEMBER, 1964

☆ U. S. GOVERNMENT PRINTING OFFICE 1964 744272 230